BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHUN XIA WANG	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,044,037**
	)	
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

Self-insured respondent requests review of the January 19, 2012 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 10, 2012.

APPEARANCES

Joseph J. Seiwert of Wichita, Kansas, appeared for claimant. Edward D. Heath Jr. of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained her burden of proof that she is permanently and totally disabled due to her accidental injury.

The sole issue presented for review is the nature and extent of claimant's disability. Respondent argues that the presumption of permanent total disability was rebutted by Dr. Quick's opinions and that claimant is entitled only to an award of separate scheduled injuries to her upper extremities.

Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact:

Claimant, who was age 52 when she was injured, is a native of China. She came to the United States (U.S.) in 2003 and became a citizen of this country in 2007. She commenced employment with respondent as a cook on November 5, 2006. Her work tasks for respondent included buying food, cooking, cleaning, and carrying. The lifting required by the job included containers of rice and meat weighing 50 pounds each or more.

The parties stipulated that claimant sustained a compensable personal injury by accident on April 24, 2009. Claimant testified she developed pain in her neck and both upper extremities which she attributed to the performance of her work for respondent. Claimant initially developed symptoms in her right arm in 2008. At that time, claimant received conservative treatment including physical therapy.

Claimant has engaged in no gainful employment since April 24, 2009.

At the regular hearing, claimant testified she was experiencing extreme pain in her neck and arms. She testified she was disabled and "can't do anything."[1] Before coming to the United States, claimant taught and performed music. She achieved an associates degree in music education in 1978; a bachelors degree in music management in 1990; and another bachelors degree in music education in 1994. Claimant has experience teaching music to both university (1986 to 2000) and pre-university students. She retains her ability to perform vocally and play the piano. Claimant has not attempted to teach or perform music in the U.S. because of her "language barrier."[2]

Dr. Shari L. Quick, who is board certified in physical medicine and rehabilitation, examined claimant on November 16, 2009, at the request of respondent's counsel. Claimant reported cervical and bilateral upper extremity pain, however, Dr. Quick found evidence of symptom magnification. Claimant's range of motion could not be assessed due to self-limitation in all planes of motion. Dr. Quick testified it was difficult to reach a diagnosis because claimant magnified her symptoms, which included pain and decreased sensation encompassing all of her upper extremities. Because she could not obtain valid

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[1] R.H. Trans. at 12.

[2] R.H. Trans. at 18. Although claimant took two years of "English as a second language" classes, she only understands a little English and she does not speak it well. Lindahl Depo., Ex. 2 at 1. An interpreter accompanied claimant and assisted her at the regular hearing and her appointments with Mr. Lindahl, Drs. Fluter, Quick and Ketchum.

measurements, Dr. Quick could not rate claimant's functional impairment under the AMA *Guides*[3].

Despite Dr. Quick's difficulty assessing claimant's diagnosis and functional impairment, she did admit:

(1) that claimant had EMG evidence of bilateral carpal tunnel syndrome.

(2) that plain x-rays and an MRI scan of the cervical spine revealed loss of normal cervical lordosis, which is consistent with muscle spasm.

(3) and that there was evidence on physical examination of trigger points and muscle spasm in claimant's trapezius muscles.

Dr. Quick admitted that claimant was not at maximum medical improvement (MMI) at the time of her examination and that she recommended treatment, consisting of a trial of the prescription medication Neurontin and trigger point injections.

Dr. Quick testified that, from a musculoskeletal standpoint, claimant was capable of performing substantial gainful employment. However, she admitted that she had not reviewed the FCE performed in July 2010; that she had no vocational expertise; and that she could not identify what jobs claimant could perform. Dr. Quick expressed no opinion regarding task loss.

Dr. George Fluter, a specialist in physical medicine and rehabilitation, examined claimant at the request of her counsel on November 4, 2010. Dr. Fluter noted that claimant underwent a cervical MRI scan on May 19, 2009, which revealed: (1) straightening of the normal curvature of the cervical spine, which was consistent with muscle spasm; (2) bone spurring and disc desiccation; and (3) some narrowing of the spinal canal at C4-5 with no clear evidence of cord compression. Claimant reported to Dr. Fluter symptoms of pain in the neck, upper back, both shoulder girdles, and both arms.

Dr. Fluter's diagnostic impressions were:

(1) bilateral upper extremity and neck pain.

(2) bilateral upper extremity overuse repetitive trauma syndrome.

(3) impingement, tendonitis, and bursitis of both shoulders; medial and lateral epicondylitis at both elbows.

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

(4) bilateral de Quervain's tenosynovitis.

(5) bilateral carpal tunnel syndrome, confirmed by EMG testing.

(6) myofascial pain of the neck and upper back.

Dr. Fluter noted that claimant had received no treatment for her cervical spine. He rated claimant's permanent impairments as follows:

impingement/tendonitis/bursitis	bilateral shoulders	10% each
medial and lateral epicondylitis	bilateral elbows	5% each
deQuervain's tenosynovitis	bilateral wrists	3% each
mild degree of median nerve entrapment bilaterally	bilateral wrists	10% each
myofascial pain	cervicothoracic spine	5% to the body

Using the AMA *Guides*' Combined Values Chart, the total permanent partial impairment to each upper extremity was 25 percent. These upper extremity impairments convert to bodily impairments of 15 percent for each extremity. Combining the upper extremity impairments with the 5 percent whole body impairment for the cervical spine results in a total impairment to the body as a whole of 32 percent.

Dr. Fluter imposed the following physical restrictions: (1) lifting, carrying, pushing and pulling limited to 5 pounds or less; (2) avoid holding the head or neck in awkward and/or extreme positions; (3) overhead activities limited to an occasional basis; (4) restrict activities at or above shoulder level using each arm to an occasional basis; (5) activities greater than 24 inches away from the body using either arm limited to an occasional basis; (6) repetitive flexion, extension, pronation, and supination of each elbow limited to an occasional basis; (7) repetitive flexion, extension, radial deviation and ulnar deviation of each wrist restricted to an occasional basis; (8) repetitive hand grasping limited to an occasional basis; and, (9) utilize thermal protection for the hands when working in cold environments.

Dr. Fluter recommended the use of non-steroidal anti-inflammatory medications and topical preparations such as Lidoderm patches to provide some relief. Dr. Fluter also recommended the use of neoprene sleeves and braces for the hands, wrists, forearms and elbows to help with pain.

Dr. Fluter reviewed a task list prepared by Doug Lindahl and concluded claimant could no longer perform 16 of the 21 tasks for a 76 percent task loss.

Doug Lindahl, a vocational rehabilitation counselor and consultant, conducted a personal interview with claimant on January 12, 2011, at the request of claimant's attorney. Mr. Lindahl prepared a list of 21 non-duplicative work tasks claimant performed in the 15-year period before her injury. At the time of the interview, claimant was not working. In Mr. Lindahl's opinion, considering the restrictions of Dr. Geist[4] and Dr. Fluter, as well as claimant's lack of facility with the English language, claimant was precluded from all available work of which he was aware. Mr. Lindahl further commented "that there are no jobs left in the open labor market that she could compete for."[5] No other vocational testimony was presented.

On June 16, 2011, the ALJ ordered an independent medical examination (IME) by Dr. Lynn Ketchum, a specialist in the treatment of the upper extremities, to provide his opinion regarding additional medical care necessary to cure and relieve the effects of claimant's injuries. Dr. Ketchum found some nonphysiological responses on examination, e.g., the doctor lightly pressed claimant's lateral humeral epicondyles which elicited neck complaints. Dr. Ketchum did not assess the neck because it was beyond his expertise. However, he did recommend someone else examine the neck and that updated testing (presumably an EMG/NCS) be performed by Dr. Jonson Huang, a neurologist, to rule out cervical radiculopathy and to determine the status of her bilateral carpal tunnel syndrome. Dr. Ketchum diagnosed very mild bilateral carpal tunnel syndrome. The doctor was unable to make treatment recommendations until the recommended testing was performed. The record does not reveal whether or not the testing was conducted. Dr. Ketchum expressed no opinion regarding functional impairment, permanent restrictions, or task loss.

PRINCIPLES OF LAW

K.S.A. 44-501(a) states in part:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows:

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[4] No report or record of Dr. Geist is in evidence, however, Doug Lindhal's narrative report, which was offered into evidence without objection, quotes the restrictions of Dr. Geist: "Occasionally lift and push/pull up to 10 pounds. Never climb. Occasionally reach, no use of right or left hands for repetitive actions such as grasping." Lindahl Depo., Ex. 2 at 1.

[5] Lindahl Depo., Ex. 2 at 3.

> 'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 44-510c(a)(2) provides:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The Kansas Supreme Court has held that under K.S.A. 44-510c(a)(2) a rebuttable presumption in favor of permanent total disability arises when a claimant experiences a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof. If the presumption is not rebutted, a claimant's compensation must be computed as a permanent total disability. If the presumption of permanent total disability is rebutted with evidence that claimant is capable of engaging in any type of substantial and gainful employment, claimant's award must be calculated as a permanent partial disability.[6]

The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.[7] It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.[8] An accident that results in permanent impairment to a shoulder and the cervical spine is compensated as a general bodily disability.[9]

In Bryant[10], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e.

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[6] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007); *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[7] K.S.A. 44-510d; K.S.A. 44-510e.

[8] *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

[9] See, e.g., *Stein v. Wal-Mart*, No. 247,743, 2002 WL 31950521 (Kan. WCAB Dec. 31, 2002).

[10] *Bryant v. Excel Corp.*, 239 Kan. at 689.

> If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

Respondent does not dispute that claimant sustained injuries to her upper extremities as a consequence of the April 24, 2009 accident. The Board agrees with the ALJ that claimant also sustained permanent injury to her cervical spine in that accident.

Although Dr. Quick found evidence of symptom magnification, she also found objective evidence of injury in the neck and upper extremities. Claimant's EMG testing was positive for bilateral carpal tunnel syndrome, albeit mild in nature. Claimant's cervical MRI scan revealed a straightening of the neck's normal curvature, which was consistent with the presence of muscle spasm. Dr. Quick's physical examination showed evidence of muscle spasm and trigger points in claimant's trapezius muscles. The doctor did not provide opinions regarding permanent impairment of function because of her inability to obtain valid range of motion measurements. However, Dr. Quick found that claimant was not at MMI at the time of her examination. She recommended claimant undergo trigger point injections and take the prescription medication Neurontin.

Dr. Ketchum did not express opinions regarding impairment of function in his IME report. But he recommended additional testing and perhaps treatment depending upon what the additional testing revealed.

Dr. Fluter found permanent impairment of function in both claimant's cervical spine and upper extremities. The Board agrees with the ALJ that under the circumstances of this claim, the opinions of Dr. Fluter are more persuasive than those of Dr. Quick. Dr. Fluter rated claimant's impairment at 25 percent for each upper extremity, which coverts to 15 percent to the whole body for each extremity. When combined with the 5 percent impairment to the body Dr. Fluter found for the cervical spine injury, claimant's overall impairment is 32 percent to the body as a whole.

Since claimant's injuries are not limited to those in the schedule set forth in K.S.A. 44-510d, then claimant is entitled to permanent partial disability compensation (PPD) under K.S.A. 44-510e or permanent total disability under K.S.A. 44-510c.

The existence, extent, and duration of an injured worker's disability is a question of fact[11] over which the Board exercises de novo jurisdiction. An injured worker is permanently totally disabled when rendered "essentially and realistically unemployable."[12]

On page 4 of the ALJ's Award, reference is made to "claimant's move back to China." Statements made by both counsel at oral argument referred to a return by claimant to her native country. However, there is no evidence in the record to establish whether the claimant did in fact change her residence from Kansas to China and, if so, when claimant made that change of residence. The statements of counsel are not evidence. Furthermore, counsel were unable to agree upon a stipulation concerning this.

The Board finds that claimant was, as determined by the ALJ, permanently and totally disabled as a consequence of her accidental injuries, however, such permanent total disability (PTD) ended if and when claimant moved back to China. Following her return to China, claimant is no longer entitled to PTD benefits, but instead she became entitled to PPD benefits.

Claimant's work history in the United States, as evidenced by Mr. Lindahl's testimony, is limited to unskilled manual labor positions, including jobs as a cook and a housekeeper. Claimant has a substantial amount of education and work experience as a teacher of music. However, claimant's lack of facility in speaking and understanding the English language renders her education and experience as a music teacher of limited usefulness in this country. Despite years of living and working in the United States,

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[11] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[12] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

claimant required the use of interpreters at the regular hearing and her appointments with Mr. Lindahl, Drs. Ketchum, Fluter and Quick. There is no evidence to refute claimant's testimony about her difficulty speaking and understanding English.

If, however, claimant has changed her residence from the United States to China, claimant's language barrier would not constitute the hindrance to perform substantial gainful employment as it did in this country. Claimant admitted at the regular hearing that she is still capable of playing the piano and vocalizing. Her years as a professor of music and the skills she retains as a vocalist and a pianist would increase claimant's ability to perform substantial gainful employment. There is no evidence that Mr. Lindahl's expertise extends to the open labor market in the People's Republic of China.

The Board finds that if claimant has in fact moved back to China, then as of the date she left the U.S., she is entitled to PPD pursuant to K.S.A. 44-510e. Under that statute, claimant is entitled to work disability benefits to the extent that her work disability exceeds her functional impairment. The undisputed evidence is that claimant has not worked since April 24, 2009, and that she accordingly has a 100% wage loss. Only Dr. Fluter testified to claimant's task loss, which in his opinion was 76 percent. Claimant is entitled to PPD based on an 88 percent work disability (100 percent wage loss plus 76 percent task loss, divided by 2) from the date she moved back to China, if she in fact did so.

The Board finds that this claim shall be remanded to the ALJ with instructions to reopen the evidentiary record for the presentation of evidence by the parties regarding whether, and if so, when claimant changed her residence from this country to China. The Board has authority to remand this claim pursuant to K.S.A. 44-551(i)(1). The Board finds there is good cause to reopen the evidentiary record pursuant to K.S.A. 44-523(b)(3). The ALJ is then instructed to recalculate the award in a manner consistent with the findings and conclusions set forth in this order.

The Board does not retain jurisdiction of this claim.

CONCLUSIONS

(1) The award is modified to find that claimant is entitled to PTD until claimant changed her residence from the U.S. to China, if that did in fact occur. From the date claimant left the U.S. to return to China, claimant is no longer entitled to PTD, but is instead entitled to PPD based on an 88 percent work disability.

(2) The claim shall be remanded to the ALJ with instructions for the ALJ to reopen the evidentiary record for the limited purpose of the presentation of evidence regarding claimant's residential status.

(3) Following such presentation of additional evidence, the ALJ is instructed to recalculate the award in conformity with the findings and conclusions set forth herein.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 19, 2012 is hereby affirmed in part, reversed in part, and remanded for further proceedings.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Joseph J. Seiwert, Attorney for Claimant, jjseiwert@sbcglobal.net
Edward D. Heath Jr., Attorney for Respondent, heathlaw@swbell.net
Brad E. Avery, Administrative Law Judge

[13] K.S.A. 2009 Supp. 44-555c(k).